



## **ENVIRONMENTAL PROTECTION AGENCY**

### **40 CFR Part 52**

**[EPA-R06-OAR-2022-0279; FRL-10675-01-R6]**

### **Air Plan Approval; Oklahoma; Updates to the State Implementation Plan**

#### **Incorporation by Reference Provisions**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** Pursuant to the Federal Clean Air Act (CAA or the Act), the Environmental Protection Agency (EPA) is proposing to approve revisions to the Oklahoma State Implementation Plan (SIP) submitted by the State of Oklahoma designee on December 17, 2021, and January 30, 2023. This action addresses the submittal of revisions to the Oklahoma SIP to update the incorporation by reference provision of Federal requirements under Oklahoma Administrative Code (OAC).

**DATES:** Written comments must be received on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

**ADDRESSES:** Submit your comments, identified by Docket No. EPA-R06-OAR-2022-0279, at <https://www.regulations.gov> or via email to [wiley.adina@epa.gov](mailto:wiley.adina@epa.gov). Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from Regulations.gov. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (i.e.

on the web, cloud, or other file sharing system). For additional submission methods, please contact Adina Wiley, 214-665-2115, [wiley.adina@epa.gov](mailto:wiley.adina@epa.gov). For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit

<https://www.epa.gov/dockets/commenting-epa-dockets>.

*Docket:* The index to the docket for this action is available electronically at [www.regulations.gov](http://www.regulations.gov). While all documents in the docket are listed in the index, some information may not be publicly available due to docket file size restrictions or content (e.g., CBI).

**FOR FURTHER INFORMATION CONTACT:** Ms. Adina Wiley, EPA Region 6 Office, Air Permits Section, 214-665-2115, [wiley.adina@epa.gov](mailto:wiley.adina@epa.gov). Out of an abundance of caution for members of the public and our staff, the EPA Region 6 office may be closed to the public to reduce the risk of transmitting COVID-19. We encourage the public to submit comments via <https://www.regulations.gov>. Please call or e-mail the contact listed above if you need alternative access to material indexed but not provided in the docket.

**SUPPLEMENTARY INFORMATION:** Throughout this document wherever “we,” “us,” or “our” is used, we mean the EPA.

## **I. Background**

Section 110 of the Act requires states to develop air pollution regulations and control strategies to ensure that air quality meets the EPA’s National Ambient Air Quality Standards (NAAQS). These ambient standards are established under section 109 of the Act and they currently address six criteria pollutants: Carbon monoxide, nitrogen dioxide, ozone, lead, particulate matter, and sulfur dioxide. The state’s air regulations are contained in its SIP, which is basically a clean air plan. Each state is responsible for developing SIPs to demonstrate how the NAAQS will be achieved, maintained, and

enforced. The SIP must be submitted to the EPA for approval, and any changes a state makes to the approved SIP also must be submitted to the EPA for approval.

On December 17, 2021, Mr. Kenneth Wagner, Secretary of Energy and Environment, submitted revisions to the Oklahoma SIP that included the annual SIP updates for 2021. The submittal included revisions to OAC 252:100, Subchapter 2 and Appendix Q to update the incorporation by reference of Federal requirements, which will be addressed in this proposal.

On January 30, 2023, Mr. Ken McQueen, Secretary of Energy and Environment, submitted revisions to the Oklahoma SIP that included the annual SIP updates for 2022. This submittal included revisions to OAC 252:100, Subchapter 2 and Appendix Q to update the incorporation by reference of Federal requirements, which will be addressed in this proposal. The submittal also included revisions to OAC 252:100, Subchapters 8, 37 and 39 which will be addressed by EPA at a later date and in separate rulemakings.

## **II. The EPA's Evaluation**

The accompanying Technical Support Document for this action includes a detailed analysis of the submitted revisions to the Oklahoma SIP which are the subject of this proposed rulemaking. Our analysis indicates that the December 17, 2021 and January 30, 2023, SIP revisions addressed in this proposed rulemaking action were developed in accordance with the CAA and the State provided reasonable notice and public hearing. The ODEQ submitted revisions on December 17, 2021 and January 30, 2023, to update the Incorporation by Reference provisions found in the Oklahoma SIP. In the December 17, 2021, submittal the ODEQ provided amendments to OAC 252:100-2-3 and Appendix Q that were adopted on June 11, 2021, and effective September 15, 2021. The January 30, 2023, submittal included amendments to OAC 252:100-2-3 and Appendix Q that were adopted on June 21, 2022, and effective September 15, 2022. These revisions ensure the Oklahoma SIP maintains consistency with current Federal requirements by

updating the opening paragraph of OAC 252:100-2-3 to include the current incorporation by reference date and revoking and replacing the prior version of Appendix Q.

Specifically, the ODEQ updated the incorporation by reference requirements of:

- 40 CFR part 50, appendices B and J, to ensure the Oklahoma SIP uses the current Federal reference methods for determining compliance with the NAAQS,
- 40 CFR part 51, subpart A, table 1 to appendix A to use current requirements in the Oklahoma emission inventory reporting requirements,
- 40 CFR part 51, paragraph 51.100(s)(1) of subpart F, to use the Federal definition of volatile organic compound,
- 40 CFR part 51, appendix P, to use Federal emission monitoring requirements,
- 40 CFR part 51, appendix W, to use current Federal guidance on air quality models, and
- 40 CFR part 98, table A-1 of subpart A, to use current global warming potentials in the Oklahoma air permitting programs.

### **III. Impact on Areas of Indian Country**

Following the U.S. Supreme Court decision in *McGirt v Oklahoma*, 140 S. Ct. 2452 (2020), the Governor of the State of Oklahoma requested approval under Section 10211(a) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act of 2005: A Legacy for Users, Pub. Law 109-59, 119 Stat. 1144, 1937 (August 10, 2005) ("SAFETEA"), to administer in certain areas of Indian country (as defined at 18 U.S.C. 1151) the State's environmental regulatory programs that were previously approved by the EPA for areas outside of Indian country. The State's request excluded certain areas of Indian country further described below. In addition, the State only sought approval to the

extent that such approval is necessary for the State to administer a program in light of *Oklahoma Dept. of Environmental Quality v. EPA*, 740 F.3d 185 (D.C. Cir. 2014).<sup>1</sup>

On October 1, 2020, the EPA approved Oklahoma’s SAFETEA request to administer all the State’s EPA-approved environmental regulatory programs, including the Oklahoma SIP, in the requested areas of Indian country. As requested by Oklahoma, the EPA’s approval under SAFETEA does not include Indian country lands, including rights-of-way running through the same, that: (1) qualify as Indian allotments, the Indian titles to which have not been extinguished, under 18 U.S.C. 1151(c); (2) are held in trust by the United States on behalf of an individual Indian or Tribe; or (3) are owned in fee by a Tribe, if the Tribe (a) acquired that fee title to such land, or an area that included such land, in accordance with a treaty with the United States to which such Tribe was a party, and (b) never allotted the land to a member or citizen of the Tribe (collectively “excluded Indian country lands”).

The EPA’s approval under SAFETEA expressly provided that to the extent EPA’s prior approvals of Oklahoma’s environmental programs excluded Indian country, any such exclusions are superseded for the geographic areas of Indian country covered by the EPA’s approval of Oklahoma’s SAFETEA request.<sup>2</sup> The approval also provided that future revisions or amendments to Oklahoma’s approved environmental regulatory programs would extend to the covered areas of Indian country (without any further need for additional requests under SAFETEA).

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<sup>1</sup> In *ODEQ v. EPA*, the D.C. Circuit held that under the CAA, a state has the authority to implement a SIP in non-reservation areas of Indian country in the state, where there has been no demonstration of tribal jurisdiction. Under the D.C. Circuit’s decision, the CAA does not provide authority to states to implement SIPs in Indian reservations. *ODEQ* did not, however, substantively address the separate authority in Indian country provided specifically to Oklahoma under SAFETEA. That separate authority was not invoked until the State submitted its request under SAFETEA, and was not approved until EPA’s decision, described in this section, on October 1, 2020.

<sup>2</sup> EPA’s prior approvals relating to Oklahoma’s SIP frequently noted that the SIP was not approved to apply in areas of Indian country (consistent with the D.C. Circuit’s decision in *ODEQ v. EPA*) located in the state. *See, e.g.*, 85 FR 20178, 20180 (April 10, 2020). Such prior expressed limitations are superseded by the EPA’s approval of Oklahoma’s SAFETEA request.

The EPA is proposing to approve updates to the Oklahoma SIP incorporation by reference provisions to maintain consistency with Federal requirements, which will apply statewide in Oklahoma. Consistent with the D.C. Circuit’s decision in *ODEQ v. EPA* and with the EPA’s October 1, 2020, SAFETEA approval, if this approval is finalized as proposed, these SIP revisions will apply to all Indian country within the State of Oklahoma, other than the excluded Indian country lands, as described above. Because – per the State’s request under SAFETEA – EPA’s October 1, 2020, approval does not displace any SIP authority previously exercised by the State under the CAA as interpreted in *ODEQ v. EPA*, the SIP will also apply to any Indian allotments or dependent Indian communities located outside of an Indian reservation over which there has been no demonstration of tribal authority.<sup>3</sup>

#### **IV. Proposed Action**

We are proposing to approve under section 110 of the CAA, the December 17, 2021, and January 30, 2023, revisions to the Oklahoma SIP to update the incorporation by reference dates for Federal requirements. We have determined that these revisions were developed in accordance with the CAA and the EPA’s regulations, policy, and guidance for SIP development.

The EPA proposes approval of the following revisions to the Oklahoma SIP adopted on June 11, 2021, effective September 15, 2021, and submitted to the EPA on December 17, 2021:

- Revisions to OAC 252:100-2-3, Incorporation by Reference,

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<sup>3</sup> In accordance with Executive Order 13990, EPA is currently reviewing our October 1, 2020 SAFETEA approval and expects to engage in further discussions with tribal governments and the State of Oklahoma as part of this review. EPA also notes that the October 1, 2020 approval is the subject of a pending challenge in Federal court. (*Pawnee v Regan*, No. 20-9635 (10th Cir.)). Pending completion of EPA’s review, EPA is proceeding with this proposed action in accordance with the October 1, 2020 approval. EPA’s final action on the approved revisions to the Oklahoma SIP that include revisions to OAC 252:100- 2-3 and Appendix Q will address the scope of the state’s program with respect to Indian country, and may make any appropriate adjustments, based on the status of our review at that time. If EPA’s final action on Oklahoma’s SIP is taken before our review of the SAFETEA approval is complete, EPA may make further changes to the approval of Oklahoma’s program to reflect the outcome of the SAFETEA review.

- Repeal of OAC 252:100, Appendix Q, and
- Adoption of new OAC 252:100. Appendix Q.

The EPA proposes approval of the following revisions to the Oklahoma SIP adopted on June 21, 2022, effective September 15, 2022, and submitted to the EPA on January 30, 2023:

- Revisions to OAC 252:100-2-3, Incorporation by Reference,
- Repeal of OAC 252:100, Appendix Q, and
- Adoption of new OAC 252:100. Appendix Q.

## **V. Environmental Justice Considerations**

The EPA reviewed demographic data, which provides an assessment of individual demographic groups of the populations living within Oklahoma.<sup>4</sup> The EPA then compared the data to the national average for each of the demographic groups. The results of this analysis are being provided for informational and transparency purposes. The results of the demographic analysis indicate that, for populations within Oklahoma, the percent people of color (persons who reported their race as a category other than White alone (not Hispanic or Latino)) is less than the national average (35 percent versus 40 percent). Within people of color, the percent of the population that is Black or African American alone is lower than the national average (7.8 percent versus 13.4 percent) and the percent of the population that is American Indian/Alaska Native is significantly higher than the national average (9.4 percent versus 1.3 percent). The percent of the population that is two or more races is higher than the national averages (6.3 percent versus 2.8 percent). The percent of persons in poverty in Oklahoma is higher than the national average (14.3 percent versus 11.4 percent). The percent of persons aged 25 years and older with a high school diploma in Oklahoma is similar to the national average (88.6

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<sup>4</sup> See the United States Census Bureau's QuickFacts on Oklahoma at <https://www.census.gov/quickfacts/fact/table/OK,US/PST045221>.

percent versus 88.5 percent), while the percent with a Bachelor's degree or higher is below the national average (26.1 percent versus 32.9 percent).

This action proposes to approve revisions to the Oklahoma SIP to update the incorporation by reference provisions to maintain consistency with Federal requirements; thus, enabling the State of Oklahoma to implement control strategies and permitting programs. We expect that this action, if finalized, will generally achieve emissions reductions and contribute to reduced environmental and health impacts on all populations in Oklahoma, including people of color and low-income populations. Further, there is no information in the record indicating that this action is expected to have disproportionately high or adverse human health or environmental effects on a particular group of people.

## **VI. Incorporation by Reference**

In this action, we are proposing to include in a final rule regulatory text that includes incorporation by reference. In accordance with the requirements of 1 CFR 51.5, we are proposing to incorporate by reference revisions to the Oklahoma regulations that update Oklahoma's incorporation by reference of certain Federal regulations in 40 CFR parts 50, 51, and 98 identified and discussed in Section II, The EPA's Evaluation, and Section IV, Proposed Action, of this preamble. We have made, and will continue to make, these documents generally available electronically through *www.regulations.gov* (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

## **VII. Statutory and Executive Order Reviews**

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, the EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely proposes to approve state law as meeting Federal requirements and does



not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a “significant regulatory action” subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

Executive Order 12898 (Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations, 59 FR 7629, February 16, 1994) directs Federal agencies to identify and address “disproportionately high and adverse human health or environmental effects” of their actions on minority populations and low-income populations to the greatest extent practicable and permitted by law. EPA defines environmental justice (EJ) as “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.” EPA further defines the term fair treatment to mean that “no group of people should bear a disproportionate burden of environmental harms and risks, including those resulting from the negative environmental consequences of industrial, governmental, and commercial operations or programs and policies.”

The air agency did not evaluate environmental justice considerations as part of its SIP submittal; the CAA and applicable implementing regulations neither prohibit nor require such an evaluation. The EPA performed an environmental justice analysis, as is described above in the section titled, “Environmental Justice Considerations.” The analysis was done for the purpose of providing additional context and information about this rulemaking to the public, not as a basis of the action. Due to the nature of the action being taken here, this action is expected to have a neutral to positive impact on the air quality of the affected area. In addition, there is no information in the record upon which this decision is based inconsistent with the stated goal of E.O. 12898 of achieving environmental justice for people of color, low-income populations, and Indigenous peoples.

This proposed approval of revisions to the Oklahoma SIP that update the incorporation by reference dates for Federal requirements as discussed more fully elsewhere in this document will apply, if finalized as proposed, to certain areas of Indian

country as discussed in the preamble, and therefore has tribal implications as specified in E.O. 13175 (65 FR 67249, November 9, 2000). However, this action will neither impose substantial direct compliance costs on federally recognized tribal governments, nor preempt tribal law. This action will not impose substantial direct compliance costs on federally recognized tribal governments because no actions will be required of tribal governments. This action will also not preempt tribal law as no Oklahoma tribe implements a regulatory program under the CAA, and thus does not have applicable or related tribal laws. Consistent with the EPA Policy on Consultation and Coordination with Indian Tribes (May 4, 2011), the EPA has engaged with tribal governments that may be affected by this action and provided information about this action.

**List of Subjects in 40 CFR Part 52**

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

**Authority:** 42 U.S.C. 7401 *et seq.*

Dated: February 28, 2023.

**Earthea Nance,**

*Regional Administrator, Region 6.*

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